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No. 328

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

GILBERT R. MASON, et al ..... Petitioners

vs.

CITY OF BILOXI, MISSISSIPPI ..... Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

No opinion was rendered by the Supreme Court of the State of Mississippi, but it's judgment is reported in 184 So. 2d at Page 113. The judgment being as follows:

JUDGMENT OF SUPREME COURT OF MISSISSIPPI

Monday, March 21, 1966, Court Sitting

No. 43,705

This cause having been submitted at a former day of this Term on the Record herein from the Circuit Court Harrison County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 22nd day of February 1965

be and the same is hereby affirmed. It is further ordered and adjudged that the City of Biloxi do have and recover of and from the appellants and Rev. Robert Nance and J. O. Tate D.D.S., sureties on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

Minute Book "BN" Page 528.

JURISDICTION

The question of private ownership and the right of the general public to use the beach area upon which the Petitioners were arrested is presently under consideration upon fully developed facts in the case now pending in the United States District Court for the Southern District of Mississippi, Southern Division, styled United States vs. Harrison County, Mississippi, et al, Cause No. 2262. This case filed by the United States in 1960 has been tried at great length and expense with the United States, Harrison County, the City of Biloxi, and all individual landowners along the entire beach area involved as parties to this suit; the cause has been fully tried and submitted on briefs and oral arguments and Judge William Harold Cox is now in the process of preparing findings of fact and conclusions of law and his decision is expected at an early date. It is therefore believed that said cause will be fully determinative on the issues involved in this case relating to the question of ownership of the land involved and it is therefore submitted that the question of certiorari in the present case should be abated until such time as a ruling is made in the other pending cause where the questions of title, ownership and right of use are squarely presented under fully developed and complete facts with all necessary parties before the court.

QUESTIONS PRESENTED

The Petitioners were convicted of trespass on private property in the City of Biloxi, Harrison County, Mississippi. The property where the trespass took place was erected in connection with the erection of a sloping beach protection device in the year 1951, pursuant to governmental programs and policies to which the private adjacent upland owners were not parties; the Supreme Court of the State of Mississippi has held that this strip of land (sand beach) is an artificial addition to adjacent upland and where the owner of the upland had no part in creating the artificial addition or incretion, such owner acquired a title in fee to such additional land; the landowner of the land here involved has never parted with such title by condemnation or otherwise and it remains private property.

The question therefore is not whether the petitioners' convictions offend the equal protection clause of the 14th Amendment to the Constitution of the United States, but is whether or not the fee simple property owner may enforce the state trespass laws with respect to his private property.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the following pertinent section of the *Fifth Amendment to the Constitution of the United States*:

> ". . . nor shall private property be taken for public use, without just compensation."

This case also involves the following provision of the *Mississippi Constitution, Article III, Section* 17, which provides:

"Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."

This case also involves the following Statute of the State of Mississippi:

Miss. Code Ann., 1942, Rec., Sec. 2409.7 (1964 Supp.):

Sec. 2409.7. Trespass—going into or upon, or remaining in or upon buildings, premises or lands of another after being forbidden to do so.

1. If any person or persons shall without authority of law go into or upon or remain in or upon any building, premises or land of another, whether an individual, a corporation, partnership, or association, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing including any sign hereinafter mentioned, by any owner, or lessee, or custodian, or other authorized person, or after having been forbidden to do so by such sign or signs posted on, or in such building, premises or land, or part, or portion, or area thereof, at a place or places where such sign or signs may be reasonably seen, such person or persons shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect (Laws, 1960, ch. 246, Secs. 1-3).

STATEMENT

On June 23, 1963, Petitioners, with others, went on the sand beach located on the southern portion of property of Pattie R. (Mrs. James M.) Smith Parker, in the City of Biloxi, Harrison County, Mississippi. Petitioners swam, played ball and otherwise enjoyed themselves on said property for approximately 45 minutes (R-466, R-591) without incident or interference from police officers or other persons present (R-467). After said period of time, Petitioners were notified by the landowner's representative to leave the property. After three such requests, Petitioners failed to leave whereupon they were placed under arrest for trespass.

The amended criminal affidavits charged that the Petitioners "did wilfully and unlawfully, without authority of law, remain upon land of another, to-wit Mrs. James M. Parker, on West Beach in Biloxi, Mississippi, after having been forbidden orally to do so by the duly authorized agent of said property owner authorized to control said property in violation of Section 2409.7 of the *Mississippi Code of* 1942, annotated, made an ordinance of the City of Biloxi, and in violation of Ordinance 12-24 Code of *Ordinances of the City of Biloxi.*"

On June 28, 1963, Petitioners were tried and found guilty of trespass by the Police Justice of the City of

Biloxi, Mississippi. Petitioners thereafter appealed their convictions to the County Court of Harrison County, Mississippi, and on trial de novo by jury, they were again found guilty and sentenced to thirty (30) days imprisonment in the County jail and fined $100.00 each. Petitioners thereafter prosecuted an appeal to the Circuit Court of Harrison County, Mississippi, which affirmed the judgment of the lower Court in all respects except as to imprisonment in the County jail. Thereafter on March 2, 1965, the Circuit Judge entered an order allowing an appeal to the Supreme Court of the State of Mississippi, which on March 21, 1966 affirmed the lower court Per Curiam (184 So. 2d 113). A suggestion of error was filed and overruled by the State Supreme Court on April 11, 1966.

ARGUMENT

This case presents the issue of the right of a private citizen to invoke the criminal trespass statutes of the State of Mississippi with respect to his private property.

It is undisputed that the Petitioners were on the lands of another, namely, Pattie R. (Mrs. James M.) Smith Parker, and that they remained thereon after having orally been forbidden to do so by the representative of the landowner, thus meeting each element of the Mississippi Statute on Trespass, Section 2409.7 of the *Mississippi Code of* 1942, *Recompiled.*

The principal question therefore is whether or not the land involved is private property or because of governmental involvement, to which the private land owner was not a party, loses its character as private property.

By Chapter 319 laws of 1924, Harrison County, Mississippi was authorized to and did construct a seawall

across the southern part of the county including the Parker property acquiring an easement giving it the right to construct and maintain the seawall and ingress and egress over the Parker land south of U. S. Highway 90. Thereafter, due to the construction of the seawall and wave action, that part of the beach lying south of the seawall eroded away.

Sometime later the said Harrison County undertook to borrow funds from the Federal government pursuant to applicable state and Federal statutes and later pumped up sand from the bottom of the Mississippi Sound, which pumped up land covered a part of the Parker land as well as an area that was formerly covered by water. No additional easement was acquired either prior to or subsequent to pumping in the land.

The land here involved was and is similarly situated to the land involved in the case of *Harrison County vs. Guice*[1] decided by the Mississippi Supreme Court in 1962.

It is submitted that there has been no condemnation of the property and regardless of governmental involve-

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[1] The question of ownership of the land in question was settled in the case of *Harrison County vs. Guice*, 140 Southern 2nd, Page 838 (Mississippi 1962) wherein it was held:

"The strip of land involved in the case at bar which was 'pumped up' in connection with the erection of the sloping beach protection device in 1951 is an artificial addition to the Guice uplands erected by strangers to the upland title. We have held either directly or by necessary inference that the owner of uplands bordering tidewater may not extend his land by artificially reclaiming the state-owned bottoms. *Giles v. City of Biloxi*, 237 Miss. 65. This Court has not had occasion to pass upon the question under discussion. We hold that where the owner of uplands has no part in creating the artificial addition or incretion, such owner acquires a title in fee to such additional land. Reason and authority recommend this rule.

. . . If the State, acting through the county, could 'pump up' the submerged bottoms adjacent to privately-owned lands, and thereby cut off direct access to the water, it could effectively destroy the value of much residential property as well as commercial and industrial waterfront property. Such taking of private property could not be accomplished without first paying just compensation. *Mississippi Constitution Section* 17.

ment in the land, it is and remains, private property until such time as it is taken for public use under the *Fifth Amendment to the Constitution of the United States* or the appropriate constitutional provisions of the *Constitution of the State of Mississippi, Section* 17.

It is further submitted that the entire question of the ownership of the property and obligations, if any, of Harrison County are properly before the United States District Court for the Southern District of Mississippi in a suit brought by the United States seeking enforcement of the obligations alleged to be on Harrison County, Mississippi, with respect to the sand beach. This case, *United States vs. Harrison County,* S.D. Miss. No. 2262, has been fully tried with all necessary and proper parties properly before the Court and would govern and be controlling as to the private versus public aspects of this beach property. This case is presently awaiting decision of Judge William Harold Cox, who is now preparing findings of fact and conclusions of law with respect thereto.

The Petitioners made no showing by offer of proof or otherwise that the private landowner, (Mrs. James M. Parker) was a party to the governmental programs or policies with regard to her private property and it is submitted that she is a necessary party to any declaration of taking of her said property.

There is no question that there was a wilful trespass upon the Parker property in the City of Biloxi, and that all elements of the offense have been established and the petitioner's convictions allowed to stand.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Attorneys for Petitioner

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CERTIFICATE OF SERVICE

I, ALBERT SIDNEY JOHNSTON, JR., one of the attorneys for the Respondent, City of Biloxi, Mississippi, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the.....day of November, 1966, I served copies of the attached reply brief of respondent on the petitioner as follows:

1. On Jack Greenberg, James M. Nabritt, III and Melvin Zarr, by mailing a copy in a duly addressed envelope with postage prepaid to their office at 10 Columbus Circle, New York, New York 10019 and to R. Jess Brown, by mailing a copy in a duly addressed envelope with postage prepaid to his office at 125½ North Farish Street, Jackson, Mississippi 39201.

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